FOR ARGUMENT

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 76-6617

RICHARD AUSTIN GREENE,

Petitioner,

vs.

RAYMOND D. MASSEY, Superintendent
Union Correctional Institution,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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CITATIONS

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the order of the United States District Court for the Middle District of Florida is reported as Greene v. Massey, 546 F.2d 51 (5th Cir. 1977), and is contained in the appendix. The order of the District Court dismissing the petition for writ of habeas corpus is unreported but is contained in the appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on January 26, 1977. The petition for a writ of certiorari was filed on April 23, 1977, and granted on June 20, 1977. The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Constitution of the United States, Amendment XIV, Section I:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

QUESTION PRESENTED

Did the Court of Appeals err in finding that the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution did not bar retrial of Defendant for first degree murder after the Florida Supreme Court found that the evidence was insufficient to prove the commission of that offense?

STATEMENT OF THE CASE

Petitioner, Richard Austin Greene, along with Joseph Manuel Sosa, was found guilty in a Florida state jury trial in 1965 of murder in the first degree. During that proceeding, counsel for Petitioner made a motion for a directed verdict of acquittal and a motion for new trial. Both were denied. Petitioner received the death penalty.

On November 5, 1968, the Florida Supreme Court reversed the conviction. In a per curiam decision, the Florida Supreme Court concluded that:

> [A]fter a careful review of the voluminous evidence here we are of the opinion that the evidence was definitely lacking in establishing beyond a reasonable doubt that the defendants committed murder in the first degree, and that the interests of justice require a new trial. The judgments are accordingly reversed and remanded for a new trial.

Sosa v. State, 215 So. 2d 736, 737 (Fla. 1968).

On remand from the Florida Supreme Court's reversal, Petitioner obtained a transfer of venue for his retrial to the Circuit Court of Orange County, Florida. Petitioner's request for a writ of prohibition based on the contention that his retrial for first degree murder would constitute double jeopardy was denied by the State trial court and, upon appeal of the denial, the appellate court affirmed. Sosa v. Maxwell, 234 So. 2d 690 (2d DCA Fla. 1970).

Upon retrial, Petitioner was again convicted of first degree murder, but with a recommendation for mercy. Petitioner was sentenced to life imprisonment which he has been serving continuously to date.

Petitioner appealed to the Fourth District Court of Appeal of Florida on the ground that his retrial for the same offense after the Florida Supreme Court had found the evidence at his first trial insufficient to establish his guilt beyond a reasonable doubt placed him in double jeopardy. The Fourth District Court of Appeal affirmed his conviction. Sosa and Greene v. State, 302 So. 2d 202 (4th DCA Fla. 1974). A petition for a writ of certiorari reiterating the double jeopardy claim was denied by the United States Supreme Court. Greene v. Florida, 421 U.S. 932 (1975).

Thereafter, Petitioner filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. §2254, urging that the Double Jeopardy Clause bars retrial once a conviction for the same offense is reversed because the trial court erred in not granting acquittal due to insufficient evidence. In its February 1976 order, the District Court intimated that absent prior precedent in the Fifth Circuit it

might have granted Petitioner's request. However, constrained by precedent of Fifth Circuit opinions, the District Court denied the writ.

Petitioner appealed the denial of habeas corpus relief to the United States Court of Appeals for the Fifth Circuit, pursuant to 28 U.S.C. §2253. The denial of the writ was affirmed because in addition to his motion for acquittal Petitioner had moved for a new trial. Greene v. Massey, 546 F.2d 51 (5th Cir. 1977). The Circuit Court further based its finding that retrial was proper in this case on its interpretation that the federal circuit courts have the power to reverse for retrial in such cases pursuant to 28 U.S.C. §2106 and the Florida Supreme Court has similar power of review.

ARGUMENT

I

FEDERAL HABEAS CORPUS REVIEW OF A FIFTH AMENDMENT DOUBLE JEOPARDY CLAIM IS NOT PRECLUDED AFTER CONSIDERATION OF THAT CLAIM BY A STATE COURT

Respondent urges that where the state has provided a full and fair consideration of a federal constitutional claim further review by federal habeas corpus is precluded. This, of course, is not the state of the law as established by this Court. Stone v. Powell, ____U.S.____, 96 S.Ct. 3037 (1976). Indeed, the holding in Stone is expressly limited to Fourth Amendment claims:

> We hold, therefore, that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.

96 S.Ct. at 3045-3046 (Emphasis added). Clearly, the opinion is limited to Fourth Amendment claims. In fact the majority opinion reassured those members of the Court who forsaw substantial evisceration of federal habeas corpus jurisdiction by replying thusly:

> With all respect, the hyperbold of the dissenting opinion is misdirected. Our decision today is not concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally. We do reaffirm that the exclusionary rule is a judicially created remedy rather than a personal constitutional right, see, pp. 3047-3048, supra, and we emphasize the minimal utility of the rule when sought to be applied to the Fourth Amendment claims in a habeas corpus proceeding.

Id. at 3052 n.37.

Further, Congress granted habeas corpus jurisdiction to the federal courts in remedy state court rulings because of which persons were in custody in violation of the Constitution, laws or treaties of the United States. 28 U.S.C. §2254. It is prefectly clear that questions of federal law are to be decided by federal judges when the habeas corpus statute is invoked:

> State Adjudication of questions of law cannot, under the habeas corpus statute, be accepted as binding. It is precisely these questions that the federal judge is commanded to decide.

Brown v. Allen, 344 U.S. 443 (1953). The people having enacted the habeas corpus statute, through their elected representatives, and having mandated that federal judges adjudicate the issues raised thereunder, it would seem inappropriate to diminish, by judicial action, the obvious scope of the statute.

The statute lists eight specific grounds for overturning a state court determination of a factual issue, only one of which is that the applicant failed to receive a full, fair and adequate hearing. 28 U.S.C. §2254(d)(6). The eighth ground empowers the federal court to determine whether the applicant was otherwise denied due process of law, the point being that the legislature intended to protect against an erroneous state determination of a federal constitutional right whether or not there was a full and fair hearing of the issue. 28 U.S.C. §2254(d)(6).

It may very well be true that state judges are as expert in applying federal constitutional standards and as inclined to protect federal constitutional rights as are federal judges. Stone v. Powell, ____U.S.___, 96 S.Ct. 3037, 3051n.35 (1976). But, uniformly logical consistency in applying the federal law, certainly a bulwark in encouraging respect for the law in general, would hardly be feasible with 50 states deciding what the federal law is.

This Court has not chosen to diminish the power of the federal courts to hear, pursuant to the federal habeas corpus statute, claims involving personal constitutional rights. Id. at 3052 n.37. Only those Fourth Amendment claims involving alleged exclusionary rule violations are now precluded from review if there has been a full and fair state

hearing. Id. This is because as opposed to being a personal constitutional right, the exclusionary rule is a court-created rule, the redetermination of which by a federal court after full and fair state hearing, has no bearing on the basic justice of the applicant's trial and incarceration. Id. at 3050n. 31. In such cases, the federal court would be deciding de novo, the facts already determined by the various state courts.

It is hardly arguable that any but the state's courts alone can properly determine the meaning and application of its own law, even should other courts engage in such judgments. Similarly, under the federal habeas corpus statute the Congress seemingly has deemed that the federal courts, not the state courts, are the proper arbiters in deciding the application of federal law, for as this Court has said:

> [N]o binding weight is to be attached to the State determination. The congressional requirement is greater. The State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right.

Brown v. Allen, 344 U.S. 443, 508 (1953).

No degree of state court litigation, no matter how fair or how extensive, should be left to stand free from habeas review after a state has erroneously determined that it has not violated an applicant's constitutional rights in trying him and placing him in custody. See Fay v. Noia, 372 U.S. 391 (1963); Brown v. Allen, 344 U.S. 443 (1953).

Petitioner, Richard Greene, alleges that the State of Florida violated his right not to be twice in jeopardy for the same offense. This claim involves a personal constitutional right. United States Constitution, Amendment V. It is therefore a claim properly determined by federal courts under the federal habeas corpus statute. Stone v. Powell, ____ U.S. ____, 96 S.Ct. 3037 (1976); Greene v. Massey, 546 F.2d 51 (5th Cir. 1977) (Appendix at 8-9n.6). Further, the application of the double jeopardy clause to this case is a determination of federal law and, as such, is properly cognizable pursuant to 28 U.S.C. §2254. Id.

II

THE DOUBLE JEOPARDY CLAUSE BARS RETRIAL OF A DEFENDANT FOR THE SAME OFFENSE AFTER AN APPELLATE COURT REVERSES A CONVICTION BECAUSE OF INSUFFICIENT EVIDENCE

In his reply brief, Respondent makes much of the double jeopardy clause as it affects retrial of a defendant after a mistrial has been declared. The mistrial situation sheds little light on the proper disposition to be made of Petitioner's claim, for in a mistrial situation neither the jury, the trial judge nor the appellate court has finally determined whether the defendant was guilty or not guilty under the evidence presented at trial. In Petitioner's case, however, the Florida Supreme Court, without equivocation of any kind, stated in its per curiam decision that

> After a careful review of the voluminous evidence here we are of a view that the evidence was definitely lacking in establishing beyond a reasonable doubt that the defendants committed murder in the first degree, and that the interests of justice require a new trial. The judgments are accordingly reversed and remanded for a new trial.

Sosa v. State, 215 So. 2d 736, 737 (Fla. 1968). (Emphasis added). In addition to the insufficiency of the evidence, one judge elaborated on a number of reversible errors occuring in Petitioner's trial. Id. at 747 (Ervin, J., concurring specially).

The threshhold issue is whether an appellate court's finding of insufficient evidence is entitled to be considered under the same double jeopardy principles as a trial court's finding of insufficient evidence. Petitioner urges that in both cases a defendant is entitled to a directed verdict of acquittal. In both cases the evidence has been found to be insufficient to convict.

If the trial court directs acquittal after a jury verdict of guilty defendant cannot be retried. See

United States v. Wilson, 420 U.S. 332 (1975). This is because the purpose of the Double Jeopardy Clause is to protect a person from being subjected to multiple trials. Id. at 343. See, also, Green v. United States, 355 U.S. 184 (1957). In Green, the principle was stated thusly:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity.

355 U.S. at 187. This underlying principle of the Double Jeopardy Clause to prevent multiple trials has been reaffirmed in the latest rulings of this Court. See, United States v. Martin Linen Supply Company, _____U.S._____, 97 S.Ct. 1349, 1353 (1977); United States v. Jenkins, 420 U.S. 358 (1975); United States v. Wilson, 420 U.S. 332 (1975).

Respondent cites various state and federal statutes and court rules as being a sound basis for retrying a defendant whose conviction is overturned because the prosecution failed to present sufficient evidence to convict. See, e.g., Fla. App. R. 6.16(b); 28 U.S.C. §2106. Whether or not such rules and statutes provide for retrial in such cases, these retrials are still unconstitutional. The widespread existence of these rules and statutes does not vitiate violations of the Double Jeopardy Clause which may occur if they are followed. The fact that a federal appellate court may go beyond the relief sought in exercising its power under 28 U.S.C. §2106 is not, as Respondent would have it, a license for a court to order an unconstitutional remedy. See, Forman v. United States, 361 U.S. 416 (1960). See, also, United States v. Wiley, 517 F.2d 1212 (D.C. Cir. 1975). Respondent's reliance upon Forman is ill-placed, since in that case the retrial that was ordered by the court of appeals was not based upon a finding of insufficient evidence. Id. at 425-426.

Respondent argues that Petitioner's request for a new trial in the trial court acted as a waiver of this double jeopardy defense. It appears had he not made that motion retrial for the same offense would have been precluded. See Greene v. Massey, 546 F.2d 51, 55 (Appendix at 12). Certainly, a defendant would rather be retried than have no chance at acquittal at all. But, that is the point: Why should the fact that he made a motion for a new trial have anything to do with the wholly separate consideration of whether the evidence was insufficient to sustain the conviction? See United States v. Wiley, 517 F.2d 1212, 1217 (D.C. Cir. 1975). The interests of justice hardly are served by treating defendants differently because of that fortuitous circumstance.

Respondent further argues that despite its having reversed because "the evidence was definitely lacking in establishing beyond a reasonable doubt" that the defendants were guilty, the Florida Supreme Court really reversed because there existed "an evidentiary error". Brief for Respondent at 34. However, only one justice, concurring specially, discussed the numerous reversible errors occurring in Richard Greene's trial. Sosa and Greene v. State, 215 So. 2d 736, 737-746 (Fla. 1968) (Ervin, J., Concurring specially). His opinion was joined by other members of the court. Id. However, he did join the majority in its per curiam holding that ". . . the evidence was definitely lacking in establishing beyond a reasonable doubt that the defendants committed murder in the first degree. . . ." Id. at 737. Thus, the Florida Supreme Court clearly found that not only was there reversible error in the conduct of the trial, but that in addition to that, the evidence adduced was insufficient to convict.

Respondent takes a position that the Florida Supreme Court should not be believed when it said the evidence was insufficient. Rather, Respondent would have this Court find that that court really meant that the evidence was sufficient, but just barely so, so that the interests of justice require a new trial. Brief for Respondent at 37. See United States v. Wiley, 517 F.2d 1212, 1219-1220 (D.C.Cir. 1975). The Florida Supreme Court's holding is plain and unequivocal. To say that that court meant something other than what it said is to indulge in pure speculation. Surely, the protection of a precious constitutional right will not be voided on the premise that if a court's order were unconstitutional for the clear reasons it gives in support thereof, that those reasons will be reinterpreted to justify the result.

Perhaps it should be pointed out that the Florida Supreme Court has recently reversed a murder conviction and remanded for a new trial after a finding which said, "The State simply did carry its burden of proof." McArthur v. State, No. 49,526 (Fla. Sept. 30, 1977). One justice concurred in the reversal, but he dissented as to the portion of the opinion requiring a new trial:

> Although some jurisdictions permit a new trial of an accused person by the government when convictions are reversed due to insufficient evidence, it is my opinion that such action constitutes double jeopardy, in contravention of the Fifth Amendment to the Constitution of the United States and Article I, Section 9 of the Florida Constitution. I therefore would dissent to that portion of the opinion requiring a new trial.

Id. at 13 (Boyd, J., concurring in part and dissenting in part). The Florida Supreme Court, then, has permitted retrial after a clear finding of insufficient evidence to convict on more than one occasion. The McArthur case is a clear example.

> On this record appellant's innocence has not been disproved. Only she knows the truth, and it was and is her constitutional right not to offer her explanation, her demeanor, her candor and her credibility to the jury. The state simply did not carry its burden of proof. Our jurisprudence and the justice of the cause require that the conviction entered below be reversed and that appellant, if the state so elects, be afforded a new trial.

Id. at 12. It is hardly arguable that the Florida Supreme Court does not mean the evidence is insufficient even when they reverse for a new trial since that Court has reversed for a new trial even when there is no question that the evidence was insufficient in the purest sense of that phrase.

Respondent posits that there are strong policy reasons for permitting a new trial after a reversal for insufficient evidence. First, he says, the state's case has withstood numerous trial motions by the defense and the jury has convicted the defendant. That, however, does not mean that the various motions were properly denied as is shown by countless appellate reversals. The fact that the jury has convicted a defendant does not mean that it did so by properly applying the evidence as instructed by the jury as the McArthur case, supra, clearly shows. If the prosecution has failed to make its case after having due opportunity, it is entitled to have no second chance under double jeopardy principles. See United States v. Wilson, 420 U.S. 332, 352 (1975).

Respondent urges that if appellate courts could not remand for a new trial after a finding of insufficient evidence that they would be less likely to reverse a conviction. Judges are only people, but surely they will do their duty when they see it. A defendant is just as surely subjected to double jeopardy by being retried for the same offense after a valid conviction as he is when he is retried after an acquittal. See Id. at 342-343. In such an event, there is

no benefit to society and none to a defendant forced to undergo the ordeal and expense of retrial. In fact, the more often one is tried the more likely it is that one may be found guilty even if one is innocent. See Green v. United States, 355 U.S. 184, 187-188 (1957). The fact that in the second trial Petitioner Greene received a life sentence rather than the death penalty does not correct the injustice done by subjecting him to retrial of the same offense when the evidence presented against him was insufficient to convict him at his first trial.

Respondent would have this Court accept his proposition that somehow the law of Florida allows the appellate courts of the State of Florida to reverse a technically sufficient conviction (one in which there is evidence on all the elements of a crime) and reverse "in the interests of justice" if the appellate court believes the evidence although technically sufficient, is tenuous. Brief for Respondent at 31. This proposition, however, is not recognized in Florida. State v. Smith, 249 So. 2d 16 (Fla. 1971). It is a proposition which the Second District Court of Appeal of Florida utilized in denying Petitioner Greene's application for writ of prohibition to prevent the retrial that is the subject of this cause. Sosa and Greene v. Maxwell, 234 So. 2d 690 (Fla. 2nd DCA 1970). However, when that same court attempted to utilize that theory to reverse a conviction the Florida Supreme Court quashed that Court's order. State v. Smith, 249 So. 2d 16 (Fla. 1971). Therefore, the Florida Supreme Court, recognizing no such theory as Respondent posits, when it reverses for the insufficiency of the evidence, holds that, as a matter of law, the evidence is insufficient to prove the crime. Id.

There can be no doubt that in the case of Petitioner Richard Greene the Florida Supreme Court held that the prosecution failed to carry its burden of proof. Sosa and Greene v. State, 215 So. 2d 736 (Fla. 1968).

Respondent's reliance on United States v. Tateo, 377 U.S. 463 (1964), for the proposition that judges would be less likely to reverse a conviction if the defendant could not be retried is ill-placed. Tateo was concerned with trial error, not the sufficiency of the evidence. Id. Petitioner Greene does not posit that retrial is improper in such cases. Of course it is. E.g., United States v. Wilson, 420 U.S. 332 (1975). Further, if a reversal is obtained upon the insufficiency of the evidence it may be proper to retry a defendant for a lesser included offense. See Green v. United States, 355 U.S. 184 (1957).

Richard Greene was retried for the same offense after the Supreme Court of Florida reversed his conviction because of the sufficiency of the evidence. The evidence being insufficient, his motion for a directed verdict should have been granted. Defendant could not have been retried had the trial court not erred. An appellate finding of insufficient evidence should be accorded the same remedy as such a finding by the trial court on motion for directed verdict. To fail to do so subjects a defendant to multiple prosecutions for the same offense even though the prosecution failed to meet its burden of proof, and this eventuality offends the Double Jeopardy Clause in violation of his Fifth Amendment right not to be twice subjected to jeopardy for the same offense.

CONCLUSION

For the reasons set forth above it is respectfully submitted that the judgment of the court below should be reversed and that Petitioner's conviction for first degree murder be overturned.

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